No. 82-912

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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TABLE OF AUTHORITIES

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I

A. Appellees' brief paints a false picture of public broadcasting and distorts the role of Section 399 as one constituent element in public broadcasting's public charter. Appellees' fundamental thrust is to portray public broadcasting as an industry essentially no different from the ordinary private print media, existing—except for the receipt of small amounts of public assistance—in the identical atmosphere of "journalistic independence" (Br. 7).[1] Section 399 is then portrayed as an isolated, ill-motivated, crudely restrictive (and unnecessary) incursion into the "untrammeled freedom" (Br. 15) of these "independent journalistic entities" (Br. 4) to broadcast what and how they see fit.

In fact, this picture is quite false, an empty abstraction. As our opening brief explained (Gov't Br. 9-21, 28-32), Section 399 is one element in an intricate and special universe—institutional, financial, regulatory, and legal—that is quite inapposite to the ordinary print media. This is a universe in which no one may publish at all without a license from the government granted in return for the legally enforceable undertaking to operate for the public

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[1] "Br." refers to appellees' brief.

interest, convenience and necessity. Broadcasters, unlike other journalistic entities, must take account of the needs of their local communities; must give coverage to public affairs; must, in doing so, be "fair" in reflecting differing viewpoints; and must afford a right to reply to persons who have been attacked and candidates who have been opposed. In the case of public broadcasting, these "independent journalistic entities" must themselves be either government entities or nonprofit organizations. They may not sell or accept advertising (including political advertising); are subject to special rules of financial disclosure, accounting, and employment practices; and are obligated to broadcast programming which is "primarily designed for educational or cultural purposes" (47 U.S.C. 397(9)). The public broadcasting system is to achieve "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" (47 U.S.C. (Supp. V) 396(g)(1)(A)); may not endorse or oppose political candidates; and—in the case of the vast majority of public stations that are tax-exempt—must refrain from "propaganda" and "influenc[ing] legislation" (26 U.S.C. 501(c)(3)). See Gov't Br. 16-17.

Why does this elaborate regulatory universe exist? What justifies its restrictive elements? The explanation lies, as we showed in our opening brief, in the fact that public broadcasting as we know it today was not simply a product of the private sector, an industry differing only technologically from the print media. Public broadcasting is the product of a substantive national commitment to foster and support special broadcast services of a sort *not* provided by the private sector. In the case of the print media (and even in the case of commercial broadcasting), the notion of a national undertaking to achieve an animating substantive end is quite foreign. But public broadcasting in its present form exists because of a public decision that we needed it and wanted it.

This public commitment is manifested by public support: special provisions giving sustenance to and protecting broadcasters qualified to render the special broadcast services the private sector could not provide. When it

became apparent that noncommercial organizations could not successfully compete with commercial firms, the federal government reserved special channels exclusively for noncommercial use and thereby insulated public broadcasting from the harsh competition of the commercial world.[2] When it became apparent that private financial support of noncommercial broadcasting was seriously and chronically deficient, government furnished large subsidies. Grants were first provided for the construction of public broadcasting facilities; more important, since 1967 virtually every public station has also received a steady stream of major government aid to support all aspects of station operations. Additional assistance comes in the form of critical tax subsidies. State and local governments and their instrumentalities, which own fully two-thirds of all public stations,[3] have also provided im-

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[2] Appellees disparage the importance of these reservations (Br. 3 n.6). It is clear, however, that without the reservations virtually all available VHF television stations in major cities would have been occupied by commercial broadcasters. See Gov't Br. 12-13 & nn.17, 20. In fact, only 15 (about 5%) of a total of over 290 public TV stations operate on nonreserved channels. Of these, 4 are VHF stations and 11 are UHF stations. Only 4 of the 15 operate in major markets (channels 13 and 31 in New York City, ch. 17 in Buffalo, and ch. 9 in Kansas City, Mo.). The remainder are: ch. 65 in New Haven, Conn., ch. 47 in Peoria, Ill., ch. 49 in Muncie, Ind., chs. 29 and 31 in Paducah and Owensboro, Ky., ch. 6 in Sedalia, Mo., ch. 12 in Cheyenne, Okla., chs. 49 and 30 in Columbia and Rock Hill, S.C., and chs. 6 and 46 in Harlingen and Killeen, Texas. See 47 C.F.R. 73.606; CPB, *1982 CPB Public Broadcasting Directory* 66-68. It should also be pointed out that in New York City, where no VHF reservation was made, commercial stations did occupy all available VHF stations. In order to create a noncommercial VHF outlet for New York City, extraordinary efforts had to be made; eventually, in 1962 a noncommercial group was allowed to buy —for 5.75 million—a commercial station assigned *to Newark, N.J.!* See the account in E. Barnouw, *The Image Empire* 199-200 (1970).

[3] Appellees' statistics (Br. 26 & n.37) regarding the ownership of public broadcasting stations are incorrect or misleading. The figure of 1400 stations includes radio stations ineligible for CPB grants. These are stations that operate "only part-time, at very low

portant subsidies. Direct government assistance now totals 59% of public television income and 67% of public radio income. See Gov't Br. 11-21. The primitive educational broadcasting of the 1950s has grown into the public broadcasting system of today due in very large measure to this governmental support.[4]

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power, or with a very low budget." Carnegie Commission, *A Public Trust* 40 (1979). As noted in our opening brief (at 20-21 & nn.43-45), two-thirds of all public television stations and nearly three-fifths of the eligible public radio stations are licensed either to state or local governments, state-appointed authorities or commissions, or public colleges and universities. (In 24 states, *all* public TV stations are licensed to such governmental licensees.) Thus, it is not true that "[t]he majority of CPB recipients are private, community-based educational corporations" (Br. 26 n.37). Appellees assert that 82% of the public stations receiving CPB grants were operated in 1981 by "private nonprofit educational foundations or institutions of higher learning" (*ibid.*) We are unable to replicate the arithmetic that produced this figure. Even on its face the statement obscures the fact that the overwhelming majority of university and college licensees are public institutions operated by state or local governments or their instrumentalities (*e.g.*, boards of regents). See CPB, *1982 CPB Public Broadcasting Directory* 18-50, 66-68.

[4] Attempting to minimize the importance of federal support for public broadcasting, appellees state (Br. 25) that public broadcasting "flourished for almost fifty years without a penny of federal aid." But the Carnegie Commission writing in 1967 took a very different view: "[L]ocal stations, as they are now constituted, are inadequate for the ends they must serve. There are not enough of them. Those that exist are inadequately staffed, inadequately equipped, and inadequately financed. Deficiencies affect the entire system; even the few stations that provide leadership for educational television wage a daily struggle for survival." (Carnegie Commission, *Public Television—A Program for Action* 33 (1967).)

Appellees point (Br. 3) to the fact that hundreds of noncommercial stations were begun in the early days of radio. More instructive, however, is the fate of these stations. By 1934, "[m]ost * * * had encountered insuperable financial difficulties and discontinued operation." Comment, *The Legal Problems of Educational Television*, 67 Yale L.J. 639, 642 (1958).

Appellees repeatedly suggest (see Br. 8, 9 n.19, 23, 41) that a significant segment of public broadcasting does not receive funds from the Corporation for Public Broadcasting. But as we made clear in our opening brief (at 26), at last count *all* public television

What we have here, then, is a complex and sophisticated compact between the public and private sectors. The limits placed on public broadcasters are important constituents of an affirmative goal, not extraneous restrictions on the freedoms of ordinary "independent journalistic entities." They are designed to assure that the public broadcast system will achieve the ends for which it was created. Government and private contributors rightly expect that public stations will remain true to their public mission, that they will adhere to high standards of program content, that they will not duplicate what is aired on commercial stations, and that they will serve all segments of the public rather than seeking to promote a narrow set of private goals.

Similarly, Section 399 is not, as appellees suggest, a superfluous encumbrance appended to public broadcasting for base motives. Rather, it is an integral element of public broadcasting's public charter. It helps to ensure that public stations remain "public" and serve their intended purpose. The use of public stations to further partisan political and ideological ends would be a breach of public broadcasting's compact with the government and the people. Congress has repeatedly expressed its judgment that public broadcasting can fulfill its public purposes only if it refrains from electioneering and editorializing. Allowing such practices, in Congress's view, would invite government pressure; would unfairly devote public moneys to the propagation of private views; would place an official imprimatur on certain views while disfavoring others; and would jeopardize the broad public support that public broadcasting requires. As Senator Hollings put it when he opposed amendment of Section 399 in 1978, "if we allow editorializing or sponsorship of political candidates, it could be the death knell of public broadcasting." 124 Cong. Rec. 30059 (1978).

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stations and 90% (*i.e.*, all but 24) of the eligible public radio stations received such aid. Those radio stations ineligible for CPB aid are small, low power, part-time operations. See Gov't Br. 18 & n.33, 26 & n.54.

B. Appellees play a coy game of hide-and-seek with this institutional and regulatory universe surrounding public broadcasting. They are careful never explicitly to challenge its validity. (In fact, when they argue that Section 399 is unnecessary, restrictions on broadcasters such as the fairness doctrine—restrictions that would plainly be invalid as applied to *ordinary* "independent journalistic entities"—come leaping out of the closet to demonstrate that Section 399 is superfluous.) But the First Amendment standard used by appellees to test the "editorializing" part of Section 399—that the government must "demonstrate that [the prohibition] is the most narrowly drawn regulation necessary to further a compelling state interest" [5] (Br. 13), and that the government must eschew any restriction that constitutes "the slightest intrusion into the licensee's journalistic independence" (Br. 7)—plainly casts doubt on restrictions

[5] As set out in our opening brief (at 30-32), *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) authoritatively rejects the assertion that the conventional "compelling state interest" test is apposite for broadcasting. Appellees attempt to distinguish *Red Lion* (Br. 18-20) by contending that the fairness doctrine does not limit a broadcaster's right to "air[] its own opinions" (Br. 19) and thus does not restrict the right to speak. This very contention was rejected in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), where it was argued that a statute requiring a newspaper to print replies by political candidates it had criticized or attacked did not "amount to a restriction of [the paper's] right to speak" because the paper was not precluded from saying anything it wished (418 U.S. at 256). The Court wrote (*ibid.*): "Compelling editors or publishers to publish that which '"reason" tells them should not be published' * * * operates as a command in the same sense as a statute or regulation forbidding [the paper] to publish specified matter."

Appellees (Br. 18-19) rely upon the statement in *Red Lion* (395 U.S. at 396) that "refusal to permit the broadcaster to carry a particular program or to publish his own views * * * would raise more serious First Amendment issues." (Appellees (Br. 18-19) delete the word "more" from this statement.) However, under Section 399, a public station is free to express all views, but like other speakers whose opinions are entitled to equal weight and respect, it cannot describe any particular view as the "official" view of "the station."

such as the fairness doctrine, the "right to reply" rule, and the "no propaganda" rule.

The point is vividly illustrated by appellees' stance with respect to the portion of Section 399 that forbids public broadcasters—unsubsidized or subsidized—from "support[ing] or oppos[ing] any candidate for political office." Appellees' suit as originally framed attacked Section 399 in its entirety. However, in the district court, appellee Pacifica eventually disclaimed any intention to endorse political candidates. This enables Pacifica now to claim piously that the "ban on political endorsements is not at issue here" (Br. 9 n.20). Apparently conceding our principal point—that it is legitimate for Congress to act to preserve the nonpartisan nature of public broadcasting—they then use the existence of this ban to show that Congress's fear of partisanship was unfounded because this provision of Section 399 "would fully protect against such concerns" (Br. 22 n.31). But if appellees are also correct in their assertion that, "[b]y prohibiting the broadcaster from expressing its opinions on public issues, the statute muzzles one of the very institutions that the Constitution selected to inform society and keep it free" (Br. 10), surely the point must apply a fortiori to the broadcaster's opinions on who should be elected to public office. If "the untrammeled freedom of the media to express its views is * * * indispensable to its dual societal responsibilities as educator and watchdog" (Br. 15)—and applies in an undifferentiated way to public broadcasters—why isn't it "indispensable" to leave the broadcaster "untrammeled freedom" to give "its views" on *the* central question of democracy: who should be elected? In fact, it is clear that the First Amendment theory deployed by appellees to invalidate the ban on "editorializing" in Section 399 *must* apply to invalidate the special ban on editorializing for or against candidates.[6]

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[6] It is equally clear that appellees' protestations with respect to the latter prohibition are wholly tactical, good for this day and this lawsuit only.

The point illustrates the central problem of appellees' submission in this Court. They invent a system of public broadcasting consisting of "independent journalistic entities" possessing "untrammelled freedom" to do whatever management wishes—except for the isolated and crude restriction on editorializing. At the same time they dismiss this restriction as unnecessary by positing the existence of a pervasive regulatory structure—designed for the (momentarily) valid purpose of maintaining a public broadcasting system that is fair and nonpartisan—forgetting that this structure is also quite inconsistent with the broadcaster's "untrammeled freedom." They go on to disparage the public's contribution to public broadcasting in order to obscure the fact that that contribution has a substantive purpose—to create a special sort of broadcasting that otherwise would not exist. And this point has to be obscured so that the so-called "restrictions" on public broadcasters—among them Section 399's ban on editorializing and electioneering—will not be seen for what they are: affirmative elements necessary to the existence of that sort of broadcasting. The *point* of the restrictions—"you may not operate for profit"; "you may not advertise"; "you must be 'cultural' and 'educational' "; "you may not become a partisan voice"—is not to restrict the independence of "independent journalistic entities," but to help create—to conjure forth—a sort of institution that the public could not otherwise have.

Our central submission is that Section 399 must not be viewed in isolation, in the abstract. Its meaning, and thus its validity, must be assessed in the context of the special sort of institution that is public broadcasting—publicly fostered and publicly funded in order to achieve public purposes. In that context, prohibiting public licensees from partisan electioneering and editorializing and from giving an official imprimatur to selected private views and opinions makes eminent sense and in no way prejudices the public interest in having access to any and all views and opinions on all issues of general concern.

II

Appellees grossly overstate the impact of Section 399 (*e.g.*, Section 399 "suppress[es] speech on the basis of its content"[7] and "infringes upon the paramount right of the public to receive information from a diverse range of sources" (Br. 10); Congress acted on the premise that it "can shape [noncommercial broadcasting] in its own image by banning the expression of any controversial views" (Br. 11)). In fact, Section 399's prohibition is both modest and sensible. It prohibits public stations from stating or otherwise indicating that a particular view is "the official opinion of the licensee or its management" (*In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973)). It merely precludes them from saying, "this editorial represents *the* views of this station or its management."[8]

What Section 399 prohibits—the official endorsement of a particular viewpoint by the management of a public station—would, in the context of public broadcasting, often be confusing and misleading. One portion of the audience would assume that a "public" station's views were those of the federal, state, or local government. Others would think that the station was a wholly independent authority. In a particular case, each view could be dramatically wrong. Few viewers or listeners understand who "runs" their local public station, the outside

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[7] To say that the ban on editorializing "suppress[es] speech on the basis of its content" constitutes a play on words. Section 399 does regulate certain *forms* of speech; but it is not content-related in the sense that it places restrictions upon the expression of a particular "viewpoint" or discussion of a particular "topic." *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537-538 (1980). Section 399 does not single out ideas or viewpoints for favorable or unfavorable treatment. It merely says that the management or owners of the stations may not *endorse* any particular idea or opinion as the "official" idea or opinion of "the station."

[8] As appellees acknowledge (Br. 37), "the very same opinions that cannot be expressed by the licensee could be broadcast if they were mouthed by a station commentator, by a guest being interviewed, or by a person who simply walks in off the street."

forces that influence management's expressed views, or how and why management came to be given the opportunity to use the public airwaves and public funds to express those views.

Amicus ACLU argues (Br. 22) that "[t]he audience could be protected from any confusion over whether editorials by noncommercial broadcasters are expressions of governmental views by a disclaimer to the contrary, accompanying each editorial." [9] But due to government ownership and funding of many stations, such a blanket disclaimer could be highly misleading. On the other hand, an accurate explanation of the intricate relationship between a public station and government would be complicated and confusing. Section 399's prohibition of editorializing eliminates audience confusion by simpler means and without imposing an appreciably greater restriction upon a licensee's expression. Instead of requiring a public station to explain its relationship with government, the broadcaster may present any and all views—including his own—but without an official endorsement. The views can then attract whatever interest or following they merit.[10] That seems the very essence of a free marketplace of ideas.

Appellees suggest (Br. 19) that Section 399—unlike the fairness doctrine—limits what a licensee may say

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[9] Cf. 47 U.S.C. 317(a), (c) (broadcast station must make diligent effort to learn and must announce true sponsor of paid broadcast).

[10] There is no inconsistency between Section 399 and the FCC's encouragement of editorializing by commercial stations (compare Br. 16-18, 36-37). Because commercial stations are privately owned and not dependent upon government subsidies, they are far less susceptible to government influence. Since they must make a profit to survive, they do not offer a publicly-funded target for those interested in propagandizing. And since commercial stations are sustained by private revenue, no one can legitimately complain that his tax dollars are being used to subsidize the commercial broadcaster's partisan opinions. Furthermore, commercial stations have not been fostered and protected to serve as a community resource in the same way as their noncommercial counterparts. Finally, the public understands that commercial stations are private institutions and can weigh their editorials accordingly.

rather than insuring access to a wide variety of views. In fact Section 399 serves the same purpose as the fairness doctrine: it promotes *equal* access for all viewpoints. Appellees state (Br. 37) that the station management's voice is "the one voice that most rightly should be heard." Why? This Court made it clear in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969), that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." Is the management of a public station entitled to a preference because it has received the further benefit of broadcasting on a special reserved frequency and is thereby protected from the competition of the commercial world? Or because the public station receives and in most instances depends upon public funds? [11]

Finally, we reiterate one further point. Section 399 does not "suppress" the publishing of the information that the management of Pacifica endorses a particular viewpoint. Section 399 leaves Pacifica exactly where all other citizens are—free to propagate its endorsements in all media except the subsidized public radio stations of which it happens to be the trustee. Indeed, it can editorialize to its heart's content even on its stations, if only it is willing to forego the federal trough. Given Pacifica's characterization of federal aid as being of neglible importance ("barely one-fifth of noncommercial broadcasting's income and * * * less than half the sum raised from wholly private, non-governmental sources" (Br. 25-26)), refusing Corporation for Public Broadcasting grants should not represent a major sacrifice.

III

In our opening brief, we argued that Congress promoted First Amendment values by fostering and sustain-

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[11] Appellees assert (Br. 12) that Section 399 is unconstitutional because "[t]he remedy for any feared imbalance in the marketplace of ideas is more speech, not less speech." In the present context, this is an empty slogan. Since there can be but one official "station" viewpoint on an issue, how can the remedy be more speech? Every view cannot be "official."

ing an independent public broadcasting system. With detailed references to the legislative history, we showed (Br. 21-28) that Congress designed Section 399 to protect the independence of that system. More specifically, we explained (Br. 33-40) that Section 399 was designed to serve a variety of important interests: discouraging the capture of public stations by narrow partisan or ideological groups; protecting the central mission of these stations—providing the public with a diverse and excellent programming unavailable on the commercial airwaves—from the embroilments attendant on the propagation of partisan ideological and political ends; protecting against the use of public stations for government propagandizing; and preventing the use of taxpayer money to promote private views.

Ignoring our discussion of the legislative history, appellees (Br. 21-24; see also CBS Br. 28-29) respond that Section 399 was enacted solely for the "illegitimate purpose" of protecting incumbents against editorial criticism. The "evidence" adduced for this ugly charge (Br. 22 & n.32) consists of four statements in the debates. Two of these turn out to have been made by representatives who voted against Section 399 and the Public Broadcasting Act; [12] the other two are innocuous.[13] Surely this

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[12] 113 Cong. Rec. 26417 (1967) (votes of Reps. Devine and McClure).

[13] Representative Springer (113 Cong. Rec. 26387-26388 (1967)) expressed his opposition to political endorsements by noncommercial stations, a practice appellees purport not to defend. Representative Keith (113 Cong. Rec. 26391 (1967)) was making the valid point that an administration film promoting its legislative program could have been used against opposing congressmen. The broadcasting of such federal government propaganda on public stations is just the mischief that Section 399 was properly designed to prevent.

Appellees' argument is not bolstered by its citation of secondary sources and a lower court opinion that rely on these same statements (Appellees' Br. 24 n.34; see also CBS Br. 29 n.57; ACLU Br. 21 n.11).

CBS cites three additional statements (Br. 29 n.56), including two by members of Congress who did not support the bill (113 Cong. Rec. 26417 (1967) (vote of Rep. Moss); 113 Cong. Rec. 12992

is an inadequate basis for impugning the motives of the hundreds of members of Congress from both political parties who enacted Section 399 in 1967, who voted to retain it in 1978, and who gave it its current form in 1981.

A. When they finally turn to the actual reasons that animated Congress in enacting, retaining, and amending Section 399, appellees urge this Court cavalierly to dismiss Congress's concerns on the ground that these were "entirely speculative" and find "no support in the record" (Br. 24).[14] We take this to mean that Section 399

(1967) (remarks of Sen. Thurmond)). The third, which is unobjectionable, is discussed in our opening brief (at 22 n.46). (See also ACLU Br. 21 n.11 citing same statement.) CBS seems to suggest (Br. 29 n.57) that any expression of congressional concern about controversial editorials on public stations was illegitimate. But there would be good cause for concern if such editorials evidenced capture of public stations by narrow ideological groups or if such editorials resulted from political interference. And the use of taxpayers' money to pay for any such editorializing is certainly grounds for misgivings.

[14] Appellees' other major argument (Br. 31 & n.45, 33) concedes that Congress's concerns were real but asserts that they were—apparently unbeknownst to Congress—already taken care of by the fairness doctrine and by Section 399's ban on political endorsements. We have already commented (see pages 6-8, *supra*) on the ironies created by such tactical deployment of legislative and administrative measures that are plainly invalid under appellees' own suggested First Amendment standards. In any event, we do not think it appropriate for the courts to do what the court below did—that is, to make its *own* ad hoc judgment about what exact "mix" of remedies is appropriate to avert the evils apprehended by the legislature. Congress was quite reasonable in concluding that the fairness doctrine is not a substitute for the command of Section 399 that publicly funded public stations not give official endorsement to particular views or to particular candidates.

Appellees also reiterate the suggestion (Br. 6-7, 32) that Congress's concerns in 1967 were misplaced because Congress had already solved the problem of political influence on public broadcasting by insulating the Corporation for Public Broadcasting from politics. In fact, Congress was prescient in regarding that insulation as insufficient. In 1979 the Carnegie Commission concluded: "Since the federal government legislated operating support for public broadcasting in 1967 the industry has witnessed episode after

is unconstitutional unless it is shown that the evils addressed by Section 399 had already occurred. But no such absurd rule exists. Congress in 1967 was setting on foot a new and costly public enterprise. *Of course* it was "speculating" about risks to be avoided and evils to be guarded against. That is what Congress is paid to do. In this case these risks and evils related to matters with which elected officials are all too familiar: the use of money to influence and the attraction of money for those ready to be influenced. Broadcasting is an especially inviting and valuable target for such influence. Public television and radio stations are powerful tools in the political arena. Two thirds of these stations are actually owned by agencies of state and local government; 59% of public TV income and 67% of public radio income comes from direct government grants. The "speculation" that, in the absence of Section 399, decisionmaking with respect to what editorial positions to take and what candidates to endorse could be strongly (and, what's worse, invisibly) affected by the federal, state and local government officials exercising these powers and holding these purse-strings—or by fear of them—is powerfully plausible. The converse "speculation"—that the funding process would be politicized if recipients engage in partisan ideological and political editorializing—is equally realistic. Abuses have, in fact, been documented.[15]

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episode seeming to justify the fears of interference expressed by many stations when federal support was first proposed." Carnegie Commission, *A Public Trust* 101 (1979).

[15] See Gov't Br. 24, 36-37 & n.66.

Appellees descend to the argument that fear of government influence makes no "intuitive sense" (Br. 33) because stations wishing to ingratiate themselves with government will find it difficult to figure out what is the correct government "line" or which government unit to please. This is like saying that bribery is no problem as long as the bribers' instructions are ambiguous or as long as there are lots of people of different views passing out bribes.

Appellees maintain (Br. 32 n.46) that preventing state and local government from influencing the editorial positions of public stations was not one of the purposes of Section 399. The legislative

Nor should the concern that public TV and radio could become an inviting target for "capture" by ideologically and politically partisan groups be casually dismissed.[16] Appellees assert that no such capture had been "recorded" (Br. 30) (recorded how? where?) before Section 399 was enacted. But Section 399 was enacted at the very time when the country was first committing itself to the proposition that noncommercial broadcasting should become a strong, publicly supported and massively financed enterprise. Congress's "speculation" that this commitment would make public broadcasting a new and seductive target was surely not frivolous.

B. In answering our contention that Section 399 is also justified because it prevents the use of tax dollars to subsidize private propagandizing, appellees argue that "every medium is infused with some form of direct or indirect [federal government] support" and that "[i]f the existence of such support were deemed sufficient to justify restricting the recipients' freedom of speech, the First Amendment would soon become meaningless" (Br. 27). But appellees misconceive our submission. We do not suppose that the existence of government "support"

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history of Section 399 shows that this was a clear congressional concern (see Gov't Br. 24-25 & n.53).

The assertion that Section 399 seeks illegitimately to "silence" the voice of state and local government (Br. 32 n.46; see also PBS Br. 13 n.13) is absurd. We agree that state and local government officials "retain the right to communicate their opinions on important public issues" (Br. 33 n.46). Section 399 in no way narrows that right. What it prohibits is the use of a public station to *endorse* such an opinion (or such an official) as "the" opinion (or candidate) of "the station."

[16] Some might conclude from published accounts that Pacifica's licensees themselves are hardly nonpartisan. See N.Y. Times, Feb. 28, 1977, at 26, col. 1; N.Y. Times, Feb. 22, 1977, at 62, col. 1; N.Y. Times, Feb. 12, 1977, at 1, col. 1; N.Y. Times, Mar. 24, 1975, at 34, col. 1; N.Y. Times, June 12, 1971, at 35, col. 6; N.Y. Times, Sept. 4, 1969, at 95, col. 3. These accounts in any event indicate that Pacifica's licensees have never been inhibited by Section 399 from the robust presentation of controversial views.

in any form automatically creates a right in the government to "suppress" the recipient's freedom of speech. Nor do we argue that tax funds unfairly "subsidize" the private views of any person who is supported—for instance through welfare or social security— by federal funds. We make only a narrow—but important—point. When Congress, in order to increase the diversity of the media, commits federal funds to the support of special forms of broadcasting that the private sector cannot provide, it has a special responsibility to assure that it is the aim of diversity that is served, and that tax dollars will not be captured to propagate a narrow range of private viewpoints. Public broadcast stations are a scarce and powerful resource. Most listeners can receive only one public TV station (see Gov't Br. 18 n.36). In the circumstances we believe that Congress was completely justified in concluding that it would be most unfair to devote a listener's tax dollars to the support of that station only to have that station use its privileged position to propagate as "official" a position with which that listener disagrees.[17]

C. Appellees' final onslaught on the purposes of Section 399 (Br. 34-40) consists of a litany of complaints that the statute either prohibits too much or too little. Thus Section 399 is said to be too broad because it "prohibits editorializing on all issues, not just those expressing partisan or 'pro-government' opinions" (Br. 34-35)—ignoring the fact that a statute prohibiting only "pro-government" editorials would plainly be void as both

[17] The situation of the viewer is completely different from the person who dislikes the editorial position of a magazine that enjoys low postal rates; that person can easily shift to another magazine that enjoys the same benefit and whose editorial position he prefers.

When the federal government supports political candidates through the Presidential Campaign Fund, the funds are widely distributed so that the "scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." *Buckley* v. *Valeo*, 424 U.S. 1, 91 n.124 (1976).

content-related and vague.[18] On the other hand, Section 399 is attacked as underinclusive because it "outlaws only the licensee's *editorial* speech and imposes no restriction on any other aspect of the broadcaster's public affairs programming" (Br. 36; emphasis in original)—ignoring the fact that under appellees' own analysis any statute that was broader than Section 399 in regulating propagandizing would be a fortiori unconstitutional.[19] Finally, appellees complain (Br. 38) that Section 399 is underinclusive because its prohibition on editorializing applies only to stations that receive CPB funds—ignoring the fact that unsubsidized stations are clearly less susceptible to government influence than subsidized ones.[20]

In fact, no statute could survive appellees' method of analysis, which (under the guise of least restrictive alternative analysis) simply invites the Court to engage in an illegitimate ad hoc second-guessing of the details of the regulatory scheme Congress adopted.[21]

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[18] Appellees themselves acknowledge that such a statute would be unconstitutional (Br. 34 n.48).

[19] In fact, the line drawn by Congress in limiting the prohibition to official "editorializing" is wholly sensible. The fairness doctrine can guarantee that many views will be represented on a station, but cannot manufacture more than one "official" view. If an "official" station view is to exist at all, *it* cannot be "balanced" or "objective" or "unbiased."

[20] We repeat that there are no public television stations and only 24 full-service public radio stations that receive no CPB funds.

Appellees' suggestion (Br. 41 n.56) that the 24 full-service stations not subsidized by CPB funds in fact receive significant funding from other federal sources is not supported by the sources they cite or by anything else in the record.

[21] For the same reason, appellees' equal protection attack (Br. 40-42)—which largely replicates the recital of over- and underinclusivenesses just discussed—is without merit.

Appellees' equal protection argument relies on *Carey* v. *Brown*, 447 U.S. 455 (1980), and *Police Department* v. *Mosley*, 408 U.S. 92 (1972). Those cases concerned laws restricting expression based upon its subject matter. In both cases, the Court struck down provisions prohibiting nonlabor picketing. In *Carey* the Court stated (447 U.S. at 461; emphasis added) that the statute "ac-

IV

In our opening brief, we argued (at 42-47) that Section 399 is a valid exercise of Congress's Spending Power. We noted that the statute permits public stations to editorialize but withholds subsidies from stations that do so.

Relying on *Perry* v. *Sindermann*, 408 U.S. 593 (1972), *Speiser* v. *Randall*, 357 U.S. 513 (1958), and similar cases, appellees maintain (Br. 42-47) that Section 399 impermissibly conditions the receipt of a benefit on the relinquishment of a constitutional right. As we explained in our opening brief (at 45-46), however, this case does not "fit[] the *Speiser-Perry* model" (*Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983) ("*TWR*"), slip op. 5).[22] In those cases, the benefits did not operate as a subsidy of the recipients' expression.[23]

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cord[ed] preferential treatment to the expression of views *on one particular subject*." In *Mosley* the Court observed (408 U.S. at 95; emphasis added) that "[t]he central problem with [the] ordinance is that it describes permissible picketing *in terms of its subject matter*." For this reason, the Court concluded (*Carey*, 447 U.S. at 461-462) that the laws had to be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions * * * [had to be] carefully scrutinized." See also *Mosley*, 408 U.S. at 98-99, 101. Section 399, on the other hand, does not draw distinctions based upon subject matter. It merely proscribes the official endorsement of views by the management of publicly funded noncommercial stations.

Since the district court did not decide the Equal Protection issue (see J.S. App. 18a-20a), this Court need not address it. *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312 (1971); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[22] Neither appellees nor their amici have even attempted to distinguish the Court's unanimous decision in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which held that cases like *Perry* and *Speiser* do not apply to content-neutral laws (See Gov't Br. 46).

[23] Nor was there any trace of government subsidy involved in *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (see Br. 44 n.58) (statute prohibiting clergy from serving as delegates to state constitutional convention unconstitutional because it conditions the right to be a delegate on relinquishment of right to free exercise of religion), or in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (see Br. 43) (unconsti-

Even more important, the restrictions held unconstitutional had no functional relationship to the affirmative purposes being served by the government funding. Here, on the other hand, Section 399 is part of a substantive system necessary to achieve the goals to be promoted by the government's funding.

In our opening brief (at 43-45), we argued that this case is governed by *Regan* v. *Taxation With Representation, supra.* Appellees assert (Br. 44-45) that *TWR* is distinguishable because there an organization receiving tax benefits under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), was not required to give up those benefits in order to engage in "substantial" lobbying. Such an organization, appellees note, could create an affiliate under Section 501(c)(4), 26 U.S.C. 501(c)(4), to carry on those activities. Appellees appear to argue that the present case differs from *TWR* because here Pacifica cannot operate two public radio stations (one subsidized station barred from editorializing and one nonsubsidized station free to editorialize) *in each city* in which it now has a license.

But in fact—and even on this highly attenuated reading of *TWR*—Section 399 does not prevent Pacifica from taking any editorial position on any issue in any communications medium. It is free to editorialize in print, to buy time on commercial stations, or to broadcast editorials on any of its existing stations that do not receive CPB funds. Moreover, Pacifica is not legally barred from operating a second, unsubsidized, noncommercial station in the cities where it now has outlets. See 47 C.F.R. 73.240(b), 73.636(b) (ownership of multiple noncommercial FM or television stations in same area not barred). Of course, in order to obtain additional licenses, Pacifica would have to show that any proposed station would serve the public interest, convenience, and necessity (47 U.S.C. 309(a)) and would have to satisfy all other licensing requirements. But Pacifica has no First Amendment right to obtain a new license.

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tutional to deny unemployment benefits to those who refuse on religious grounds to work on Saturdays).

Appellees argue (Br. 46) that in exercising its Spending Power Congress can do no more than prohibit the direct use of federal funds to subsidize editorializing. They therefore suggest that Congress has no legitimate right to object so long as the relatively small sums needed to pay the direct incremental costs of producing and broadcasting editorials are raised from other sources. This argument makes no sense as economics or law. Federal operating funds are unrestricted and infuse the entire operation. Without those funds, there might be no staff members to write, edit, or deliver an editorial; no station support staff; no popular programs to attract an audience or stimulate private contributions; and no studio, antenna, or broadcast facilities. Thus, there can be no doubt that, absent Section 399, the federal government would be providing a significant subsidy for editorializing.[24] The government should not be forced to choose between abandoning assistance for public broadcasting and subsidizing editorializing by those groups or persons who happen to have control of public stations.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1984

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[24] The Court has held that use of a federally funded building for sectarian instruction or religious worship constitutes federal aid to religion even if the direct costs of such use (heat, lighting, etc.) are paid from private funds. *Tilton* v. *Richardson*, 403 U.S. 672 (1971). The same principle is applicable here.

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